



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1518/12

ANNAH SIBONGILE SIBEKO

First Applicant

and

MOTOR INDUSTRY BARGAINING COUNCIL

First Respondent

ET VAN KERKEN NO

Second Respondent

LEAR SEWING (PROPRIETARY) LIMITED

Third Respondent

Delivered: 16 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed application brought in terms of the provisions of section 145 of the Labour Relations Act¹ (the LRA), to review and set aside an award issued by the Second Respondent (Arbitrator) under case number MIPT12304 dated 12 March 2012.

¹ Act 66 of 1995 as amended

- [2] In the award, the Arbitrator found that the dismissal of the Applicant by the Third Respondent was substantively fair. Aligned to the review application is a further application for condonation in respect of its late filing. This application was initially opposed until at the hearing of the matter when it was indicated that this was no longer the case.

The application for condonation:

- [3] The Applicant averred that she received a copy of the award on 14 March 2012. A review application in terms of section 145 (1) of the LRA should have been filed on no later than 25 April 2012. The Applicant however first served and filed an application for condonation on 25 June 2012 without the review application.
- [4] The Third Respondent raised a point *in limine* in regards to the irregular step taken by the Applicant in its answering affidavit that was filed and served on 10 July 2012. In her replying affidavit filed on 2 August 2012 persisted with the contention that the point *in limine* raised had no basis as she had filed a review application. I am in agreement with the Third Respondent's submissions that this was an irregular step in that a condonation application can only be filed simultaneously with the review application, and not before the filing of the review application. It follows that ordinarily, the Court would not consider whether to grant an indulgence in respect of an application that is not before it.
- [5] The application for review was filed on 2 August 2012, which makes it some ten weeks late. The court's discretion when considering applications for condonation derive from the provisions of section 191 (11) (b) of the LRA and also Rule 12 of the Rules of the Conduct of Proceedings. Thus on good cause shown, the Court may condone the non-observance of the time frames stipulated in section 191 of the LRA or in its rules. The principles surrounding the granting of condonation are well known as were articulated in *Melane v Santam Insurance Co. Ltd*². A further factor to be considered in determining

²1962 (4) SA 531 (A) at 532B-E, where the Court held that;

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it

such applications is whether it would be in the interests of justice to grant condonation or not³.

- [6] At these proceedings, the Third Respondent had indicated that it no longer opposed the application for condonation. I have noted the irregular step in the bringing of the application for condonation, and took into account that it was no longer opposed. Further having had regard to the averments and submissions made in regard to the extent and reasons for lateness, I am satisfied that given the circumstances of this case, it would not be in the interests of justice to deny condonation.

Background:

- [7] The Applicant was employed in August 1993 as a Sewing Machine Operator. She was dismissed on 31 August 2011 following upon a disciplinary enquiry into allegations of misconduct. The allegation was essentially that she had falsely laid a claim of racial abuse against the Third Respondent's Plant HR Manager, Michelle Gibbon. The Applicant alleged that Gibbon addressed her as a 'kaffir'.

The arbitration proceedings and the award:

- [8] Following her dismissal, the Applicant referred a dispute to the First Respondent (MIBCO), and the matter came before the Arbitrator, resulting in the award which is the subject of this review application. The evidence before the Arbitrator was as follows;

- 8.1 On 8 April 2011, damage to a water pipe had caused problems in the supply of water on the Third Respondent's premises. The employees

is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

³ Brummer v Gorfil Brothers Investments (Pty) Ltd [2000] (2) SA 837 (CC) at 839 F

were aggrieved at the state of affairs and embarked on whistle blowing and singing.

- 8.2 Gibbon, accompanied by the Plant Production Manager, Swanepoel, confronted the Applicant about her whistle blowing. The Applicant alleged that it was at that time that Gibbon said to her; '*Stop blowing the whistle Kaffir!*', and demanded that she refrain from her action of blowing a whistle.
- 8.3 Arising from the events of 8 April 2011, on 12 April 2011 Swanepoel issued the Applicant with two final written warnings. The first was in respect of insolence towards Gibbon in that the Applicant had acted disrespectfully towards her for blowing the whistle after being requested to refrain from doing so. The second final written warning was for insubordination, disrespect or disobedience by displaying a wilful and deliberate attitude of not submitting to authority when she refused to obey an instruction from Swanepoel to stop blowing her whistle. The Applicant had refused to sign acknowledgement of those warnings.
- 8.4 On the same day and after the warnings were issued to her, the Applicant filed a grievance against Gibbon, in which she alleged that she was verbally abused by being called a 'kaffir'. The outcome of the grievance she sought was the dismissal of Gibbon.
- 8.5 On 14 April 2011, a grievance hearing was convened and as no settlement was reached, the Third Respondent decided that Gibbon should be charged with alleged use of abusive language. During May 2011 an investigation was conducted into the allegations against Gibbon, and she was found not guilty. It was also decided that an investigation should be conducted into the Applicant's conduct due to the 'false allegation' of racial abuse against Gibbon.
- 8.6 On 28 June 2011, the Applicant was notified to attend a disciplinary enquiry scheduled for 20 July 2011. She was subsequently found guilty

and dismissed for falsely lodging a claim of racial abuse against Gibbon.

- [9] Gibbon in her evidence denied having uttered the words ascribed to her by the Applicant. According to her, the incident was sparked after a meeting was arranged to meet with the shop stewards to address the problem related to the water supply. She and Swanepoel were waiting outside the Boardroom for the shop stewards to come to the meeting when other employees started blowing whistles. She and Swanepoel went to the shop floor to establish which employees were blowing whistles. She had noticed that the Applicant was one of the employees blowing her whistle and had asked her to refrain from doing so. She vehemently denied having racially abused the Applicant in the manner described.
- [10] Swanepoel, who was with Gibbon at the time of the incident of 08 April 2011 testified that he had heard everything said by Gibbon to the Applicant and denied that the Applicant was verbally and racially abused.
- [11] The Applicant's case as introduced by her representative at the arbitration proceedings was to deny having contravened any rule. Her case was further that if she had, then the sanction of dismissal was harsh because Gibbon had provoked her, and also victimised her for having refused to work excessive overtime.
- [12] The Applicant's testimony was that Gibbon confronted her and said 'Stop kaffir'. Although other employees had seen Gibbon confront her, no one had heard what was said to her due to the noise made by the machines, the singing and whistle blowing. She also denied that Swanepoel could have heard what Gibbon had said to her either because of the noise, or due to the fact that he was not there in the first place.
- [13] Moalusi's testimony on behalf of the Applicant was that Gibbon, who was alone at the time had approached the Applicant in an angry mood. Moalusi was about four metres away from the Applicant when she was approached by Gibbon who had leaned towards her and whispered something into her ear. She did not hear what it was that Gibbon had said to the Applicant.

Swanepoel according to Moalusi was also a distance away from them so he also could not have heard what was said. Swanepoel had at some point pulled Gibbon away from the Applicant.

- [14] Lekalakala, who was a shop steward and had also represented the Applicant with the investigations, in the internal grievance and at the disciplinary hearing had also testified seeing Gibbon on her own going to speak to the Applicant. Swanepoel, at a later stage, went to where Gibbon and the Applicant were and spoke to them. Lekalakala however did not hear what Gibbon had said to the Applicant, nor had he heard what Swanepoel had said to both of them.

Grounds of review and evaluation:

- [15] It is not necessary to deal with all the grounds of review save to state that the Applicant attacked the Arbitrator's award on the basis that her decision was neither rational nor justifiable as she failed to apply her mind, misdirected herself, committed a gross irregularity, acted unreasonably and unjustifiably, and did not properly consider the facts of the case. The Third Respondent's contentions were the Arbitrator did not commit any gross irregularity, and that she came to a decision that a reasonable decision maker could have come to, based on the evidence before her.
- [16] The question that arises in this case is whether there is a basis for this Court to make a finding that the decision of the Arbitrator falls outside the band of reasonableness in accordance with the test for review as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴. In *Herholdt v Nedbank Ltd*⁵, the Supreme Court of Appeal, per Cachalia JA summarized the review test as follows:

'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will

⁴ 2008 (2) SA 24 (CC) at para 110

⁵ [2013] 11 BLLR 1074 (SCA) par 25 at 1084.

only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable.'

- [17] In the award, the issue before the Arbitrator as she had recorded it was whether or not the allegation made in the grievance against Gibbon was false and whether the latter had called the Applicant a 'kaffir'. It can therefore be accepted that in line with the approach of the Labour Appeal Court in *Goldfields Mining South Africa (Pty) Ltd v CCMA and Others*⁶, the Arbitrator had properly identified the issues she was required to determine and also understood the nature of the dispute she was required to arbitrate.
- [18] The basis of the Applicant's defence to the allegations against her as recorded by her representative in the arbitration proceedings was that she denied having contravened any rule, and that if she had, then the sanction of dismissal was harsh because Gibbon had provoked her, and also victimised her for having refused to work excessive overtime⁷. From the evidence presented, it was apparent that the Arbitrator was faced with two mutually destructive versions as it was the Applicant's word against that of Gibbon as to whether the words in question were uttered or not.
- [19] The approach to be adopted by Arbitrators when faced with two disputing versions is that as set out by Van Niekerk J in *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others*⁸, where it was held that the Arbitrator must conduct an

⁶ [2014] 1 BLLR 20 (LAC) where it was held that;

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence'

⁷ Page 8 of the record of proceedings

⁸ (2011) 32 ILJ 723 (LC) at 727C-F, also in reference to *SFW Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), where the Supreme Court of Appeal held that;

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of

‘ . . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.’

[20] In this case, I am satisfied as can be gleaned from the Arbitrator’s findings as summarised below that she had indeed assessed the credibility of the witnesses, considered the inherent probabilities or improbabilities of the versions that were proffered by the witnesses, and also conducted an assessment of the probabilities of the irreconcilable versions before her. In my judgment, and as shall further be illustrated below, there is clearly no basis for the award to be interfered with.

[21] In finding that the dismissal was fair, the Arbitrator held that the evidence of the Applicant and that of her witnesses was ‘conflicting and had improbabilities’, whilst that of the Third Respondent was consistent. The Arbitrator stated that the evidence on behalf of the Applicant was ‘conflicting’ in regards to the distance between herself and Gibbon; that since no one had

this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.’

heard what Gibbon had said to her because of the noise from machines, the singing and whistle blowing, it was unlikely that Gibbon would have whispered racial abuse to her when it was the Applicant's witnesses' testimony that Gibbon had approached her in raised voice and in an angry mood.

- [22] The Arbitrator further found that the Applicant's testimony in regards to the use of whistles at the plant was also unreliable in the light of her denials. This was in view of Swanepoel's testimony that there were rules prohibiting the use of whistles and that all employees knew of the rules as they were placed on notice boards inside the factory and discussed with shop stewards. The Arbitrator found that there was indeed a rule against whistle blowing, which the Applicant was well aware of, and which was also reasonable.
- [23] The Arbitrator also correctly found inconsistencies in the evidence of the Applicant and her witness, Moalusi in regard to what they had heard Gibbon say to the Applicant. Whilst the Applicant testified that Gibbon had called her a 'kaffir', Moalusi on the other hand had testified that the Applicant had informed her after the incident that she had referred to her as a 'black person'. It was submitted on behalf of the Applicant that the two terms in any event denote racial slurs and that to this end, it should have been found that indeed Gibbon did make racial slurs.
- [24] There is indeed a difference between the two terms allegedly used against the Applicant. Reference to 'black person' could be stated as a matter of fact unless it can be deduced from the context that it was made with a racist, demeaning or derogatory undertone. 'Kaffir' on the other hand is self-explanatory, and within the context of our racist past, refers to nothing but black people in racist and derogatory, demeaning terms. In the light of these inconsistencies between what the Applicant had alleged was said to her by Gibbon, and what she had told Moalusi, I fail to appreciate how it can be said that the Arbitrator's conclusions were irrational.
- [25] It was also found that there was no substance to the allegation that Gibbon had held a grudge against the Applicant, as Gibbon's testimony was to the effect that before the incident in question, she had never met the Applicant

before nor had they had any discussions between them regarding workplace issues.

- [26] The Arbitrator had also correctly drawn an adverse inference from the submissions made that had Gibbon not approached the Applicant in the first place, the incident would not have taken place. The argument that there was provocation and that no misconduct was committed in the same breath is mutually destructive, and the Arbitrator's conclusion that the argument was in conflict with the Applicant's case that she had done nothing wrong was reasonable.
- [27] The Arbitrator further held that if Gibbon had indeed called the Applicant a 'kaffir', she would probably have immediately raised the issue with her immediate supervisors, other managers or her union. Significantly, the shop steward, Lekalakala had also observed the incident and it is inexplicable that the Applicant would not immediately inform him of the alleged racial abuse. The Applicant instead waited two working days prior to lodging the complaint, and only did so after she was issued with final warnings. The Arbitrator's conclusions that there was no substance to the allegations made by the Applicant cannot be faulted, especially in view of the nature and extent of the abuse alleged, which any other person would have taken seriously and immediately reported.
- [28] The Arbitrator had also correctly found that the Applicant had ample time to consider her position after she was reminded of the consequences of laying a false claim, and also that there was no substance to the allegations of victimisation. The issue of victimisation was clearly a red herring in that if it was indeed serious, there was no reason for the Applicant to belatedly raise it.
- [29] With regards to the appropriateness of the sanction of dismissal, the Arbitrator took into account that the Applicant was told during the investigations that the Third Respondent took the making of racial slurs and false allegations of racial abuse in serious light; that the Applicant showed no remorse or awareness of any wrongdoing; that the making of a false claim was a serious

offence that breached a trust relationship, and further that the Applicant had been dishonest in her evidence.

- [30] The use of racially charged language and racist invectives within any workplace can never be countenanced nor left unpunished⁹. This is even moreso in our country given its painful history of racial intolerance. In this case, the Third Respondent acted correctly in convening the grievance hearing and where no substance was found in the allegations against Gibbon, to also investigate and charge the Applicant.
- [31] Clearly the Applicant was aggrieved by the two warnings issued to her after the incident related to whistle blowing. Rather than atoning for her actions and appealing against those warnings, she went on a revenge mission by accusing Gibbon of racist conduct when she knew that there was no substance in her allegations. As the Arbitrator had correctly found, the sole purpose of her grievance was to get Gibbon dismissed.
- [32] Unfounded allegations of racism against individuals has become a past time for employees who normally find themselves in a pickle at the workplace, and when they cannot justify their unbecoming conduct or get what they want. It is always easy to make such allegations because the natural reaction of third parties would be that of sympathy towards the 'victim' of the alleged racist abuse, and immediate derision towards the alleged perpetrator. However, where there is no substance to those allegations, the alleged victim must equally be rebuked¹⁰, in that those unfounded allegations not only have a detrimental effect on the alleged perpetrator, but also affect employment relations between employees of different races, and impacts negatively on a general trust relationship between the employee making those allegations and

⁹ See *South African Chemical Workers Union and Another v NCP Chlorchem (Pty) Ltd and Others* (J1399/2005) [2007] ZALC 120 (1 June 2007) at para [13], where this court held that;

'I can hardly conceive of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused. Therefor, in our country with its history of racial discrimination, it need hardly be debated, I believe, that employers, generally speaking, are enjoined to do their best to create a working environment free from racism. Apart from employers being statutorily obliged to do so, it is patently the right thing to do....'

¹⁰ See *SACWU and Another vs NCP Chlorchem (Pty) Ltd and Others* 2007 28 ILJ 1308 (LAC)

the employer¹¹. To this end, the Arbitrator's decision that the dismissal of the Applicant was substantively in these circumstances falls within a band of reasonableness.

[33] The Applicant also took issue with the fact that the Arbitrator had only dealt with the substantive fairness of the dismissal when her case was also that the dismissal was procedurally unfair. In this regard, it was submitted that the Arbitrator ignored the fact that prior to the whistle blowing incident she had no prior disciplinary warnings against her and that those issued were not procedurally correct as no disciplinary hearing was held.

[34] There is no substance in the above submissions in that in her referral, the only issue before the First Respondent and the Arbitrator was an alleged unfair dismissal dispute. An unfair labour practice dispute had not been referred simultaneously with the dismissal dispute. Secondly, at the commencement of the proceedings when the Applicant's representative made his opening submissions, the Arbitrator had asked him whether the procedural fairness was challenged, and when he referred to the two warnings, the Arbitrator correctly informed him that the warnings were not an issue for determination before her. At that point, the representative then conceded and when asked whether he was satisfied with the procedure (followed), he had responded in the positive¹². There is therefore no basis for a conclusion to be reached that the Arbitrator ignored any material in regards to procedural unfairness as none was placed before her.

[35] Having evaluated the material that was placed before the Arbitrator, and further having had regard to the submissions and arguments made on behalf of the parties, I am satisfied that the Arbitrator dealt with the substantial merits of the dispute, and that the decision arrived at was one that another decision-maker could reasonably have arrived at based on the evidence before her.

¹¹ See *Weitz v Goodyear SA (Pty) Ltd & Others* (2014) 35 ILJ 441 (ECP) at para [18]

¹² Page 9 of the transcribed record

[36] The Court extends its gratitude to Adv. Bucksteg and UNISA Law Clinic for appearing *pro bono* on behalf of the Applicant and it is therefore not necessary to consider costs.

Order:

- i. The Applicant's late filing of the review application is condoned.
- ii. The application to review and set aside the award issued by the Second Respondent under case number MIPT12304 dated 12 March 2012 is dismissed.
- iii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. H Bucksteg (*Pro Bono*)

Instructed by: UNISA Law Clinic

For the First Respondent: Mr. L Frahm-Arp of Fasken Martineau Attorneys